IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR.

J U D G M E N T

1. Prakash Chand Vs. Firm Pohap Singh Kishan Sahai & Ors.

S.B.CIVIL SECOND APPEAL No.61/1993 against the judgment & decree dated dated 8.1.1993 passed by the ADJ No.2, Alwar, in Civil Appeal No.56/1988.

2. Firm Pohap Singh Kishan Sahai & Ors. Vs. Prakash Chand

S.B.CIVIL SECOND APPEAL No.263/1993 against the judgment & decree dated dated 8.1.1993 passed by the ADJ No.2, Alwar, in Civil Appeal No.56/1988.

Date of Judgment :: May 15, 2006

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. B.L. Mandhana for the appellant-plaintiff-landlord.
Mr. R.K. Mathur for the respondents-defendant-tenant.

BY THE COURT:

1. These two cross appeals U/s. 100 CPC is a usual chequered history of protracted litigation between landlord and tenant. A pair of two shops known as `Jota' shop which has no wall in between but two separate entrance gates situated at Ramganj Bazar, Station Road, Alwar was given on rent of Rs.110/- per month by the plaintiff Prakash Chand Goyal to the defendant, firm M/s. Pohap Singh Kishan Sahai. The suit was filed for eviction of the said shop on the ground of personal bona fide necessity and default in payment of rent. The said suit

was decreed by the trial court on 27.1.1984. The first appeal against the said judgment and decree of the trial court was disposed of on 20.7.1985 by framing an additional issue No.7 on the issue of partial eviction and the matter was remanded back under Order 41 Rule 5 CPC to the trial court for return of its finding on the said additional issue. The trial court vide its order dated 31.3.1986, after taking additional evidence on the said additional issue No.7 of partial eviction, found that the suit could be decreed by directing partial eviction of the suit premises namely; shop in question and the trial court held that the said `Jota' shop could be divided in half and one portion towards the stair case could be kept by the landlord and the other portion by the tenant. After finding of issue No.7 was returned by the trial court vide order dated 31.3.1986, the first appeal of the tenant namely; appeal No. 56/88 along with cross objections of the landlord No.57/88 came to be decided by the first Appellate Court of Addl. District & Sessions Judge No.2, Alwar on 17.5.1990 and the tenant's appeal was rejected vide the operative part of the said order dated 17.5.1990.

2. However, since the findings on the issue of default issue No.4 and on partial eviction issue No.7 were given in favour of the tenant the mention in the operative part of the said order dated 17.5.1990 that the appeal of the appellant is rejected as also the cross objections of the landlord were rejected was apparently not correct. The matter was thus brought before this Court by way of second appeal at the instance of tenant and the said second appeal No. 124/90 came to be allowed by this Court on 8.8.1990 with a direction to the Appellate Court to amend the operative part of the judgment and consequent amendment in the decree. After the said remand by High

Court the first Appellate Court again disposed of the said appeal vide order dated 8.1.1993 partly allowing the appeal of the tenant and rejecting the cross objections of the landlord.

3. It is against this judgment dated 8.1.1993 that both the parties have come up in respective second appeals before this Court. Both these appeals were heard at length and are being disposed of by this common judgment.

Ground of Default

4. As far as issue No.4 relating to default is concerned, Mr. B.L. Mandhana, learned counsel appearing for the landlord empathetically submitted that the findings of the trial court in the original judgment dated 27.1.1984 as well as the judgment of the first Appellate Court dated 17.5.1990 which according to him are the only effective judgments of the two courts below while the others were upon remand and for carrying out the necessary amendment or for deciding an additional issue, the findings of both the courts on the said issue in favour of tenant are given in a slip shod manner and both the courts below have not arrived at a finding of fact based on relevant material or after holding proper inquiry in the matter that there was no default on the part of tenant in payment of arrears of rent as determined by the court U/s 13(3) of the Act or even the rent agreed to be paid at Rs.110/- per month and by referring to the various provisions of Section 13 of the Rajasthan Premises (Control of Rent & Eviction) Act, 1950 he submitted that even if the landlord did not move any application for striking out the defence of the tenant on the ground of default as envisaged under Section 13(5) of the said Act, the tenant is not absolved

from its liability or responsibility to show that he has made the deposit or paid the rent as required by sub-section (4) of Section 13 if he intends to take benefit of Section 13(6) of the Act.

5. It would be useful to reproduce the relevant sub-sections (3) to (8) of Section 13 of the said Act :

> "13. Eviction of tenants –
>
> (1)Nothwithstanding .....
>
> (2) .....
>
> (3)In a suit for eviction on the ground set forth in clause (a) of sub-section (1), with or without any of the other grounds referred to in that sub-section, the court shall, on the first date of hearing or on any other date the court may fix in this behalf which shall not be more than three months after filing of the written statement and shall be before the framing of the issues, after hearing the parties and on the basis of material on record ***provisionally determine the amount of rent to be deposited in court or paid to the landlord by the tenant.*** Such amount shall be calculated at the rate of rent at which it was last paid or was payable for the period for which the tenant may have made default including the period subsequent thereto upto the end of the month previous to that in which such determination is made together with interest on such amount calculated at the rate of six per cent per annum from the date when any such amount was payable up to the date of determination.

Provided that while determining the amount under this sub-section, the court shall not take into account the amount of rent which was barred by limitation on the date of the filing of the suit.

(4) The tenant ***shall deposit in court or pay to the landlord*** the amount determined by the court under sub-section (3) within fifteen days from the date of such determination, or within such further time not exceeding three months, as may be extended by the court. The tenant ***shall also continue to deposit in court or pay to the landlord month by month***, the monthly rent subsequent to the period up to which determination has been made, by the fifteenth of each succeeding month or within such further time not exceeding fifteen days, as may be extended by the court, at the monthly rate at which the rent was determined by the court under sub-section (3).

(5) If a tenant fails to deposit or pay any amount referred to in sub-section (4), on the date or within the time specified therein, the court shall order the ***defence against eviction to be struck out and shall proceed with the hearing of the suit.***

(6) ***If a tenant makes deposit or payment*** as required by sub-section (4), ***no decree*** for eviction on the ground specified in clause (a) of sub-section (1) shall be passed by the court against him;

> Provided that a tenant shall not be entitled to any relief under this sub-section, if having obtained such benefit or benefit under section 13-A in respect of any such accommodation, ***if he again makes a default in the payment*** of rent of that accommodation for six months.
>
> (7) If in any suit referred to in sub-section (3) there is any dispute as to the amount of rent payable by the tenant, the court shall **decide the dispute finally at the time of decision** of the suit and may, at that time, pass such orders regarding costs or interest, as having regard to the circumstances of the case, it deems fit."

6. As against this Mr. R.K. Mathur, learned counsel appearing for the tenant submitted that this contention cannot be allowed to be raised at this stage in the second appeal on the part of the landlord because the findings of both the courts below are in favour of the tenant to the effect that there was no default in the payment of rent and in the absence of any application filed on behalf of the landlord for striking out the defence, the burden of proof does not shift upon the tenant to show that he has made deposit of the arrears of rent as agreed between the parties or provisionally determined by the court under Section 13(3) of the Act. He relied upon the Judgment of Hon'ble the Supreme Court in case of **Shiv Dutt Jadiya V. Ganga Devi** (AIR 2002 SC 1163). It would be useful to extract para Nos. 5,6,7 and 9 of the said judgment.

“5. A perusal of Section 13 goes to show that failure of the tenant to pay or tender the rent due from him for a period of six months provides a ground for his eviction. On a suit for such relief being instituted by landlord, the tenant must deposit in Court or pay to the landlord the arrears of rent on the first date of hearing or within 15 days from the date of determination by the Court of provisional amount, or within the extended time, and thereafter continue to deposit in Court or pay to the landlord month by month the monthly rent falling due for the subsequent period, as contemplated by sub-section (3) and sub-section (4) of Section 13. Failure to make deposit or payment consistently with sub-section (4) may entail defence against eviction being struck out. However, compliance with sub-section (4) confers on the tenant an immunity from eviction on the ground specified in clause (a) of sub-section (1). Such immunity is one time benefit given to the tenant. If the tenant commits a default for a second time, having earned once earlier an immunity from eviction within the meaning of sub-section (6), then, on a subsequent suit being filed, the tenant cannot once again escape the decree for eviction in spite of compliance with the provisions of sub-section (4).

(6) On a suit for eviction being instituted, compliance with sub-section (4) by the tenant as contemplated by Section 13 is in “Court”. The legislature has not chosen to use words “trial Court” in the framing of Section 13. Ordinarily, an appeal is a continuation of suit. The tenant is bound to comply with provisions of sub-section (4) if the claim for

eviction on having been denied by the trial Court is pursued in appeal by the landlord. In spite of a decree for eviction having been refused by the trial Court, the appellate Court may still, in an appeal preferred by the landlord, pass a decree for eviction. On the date of the passing of the decree, the appellate Court shall have to see, in view of the obligation cast on it by sub-section (6), whether the tenant had made deposit or payment, as required by sub-section (4). Any view to the contrary may result in creating an incongruous or inequitable situation. If it was to be held that on decision by the trial Court, the obligation of the tenant to pay or tender the rent, in the manner prescribed by sub-section (4) comes to an end, then, although the landlord is still pursuing his claim for eviction before the appellate Court and the decision of appeal may take its own time, the need on the part of the tenant to pay or tender the rent to the landlord or deposit the same in the Court shall stand dispensed with. We do not think that Section 13 contemplates such a situation. The object behind enacting Section 13 is that ***pendency of litigation should not be used by tenant as an excuse for suspending his obligation to regularly pay the rent*** and the landlord should not be compelled to file separate proceedings for recovery of rent falling due during the pendency of already filed eviction proceedings.

(7) In the case before us, the issue of the tenant having committed a default and hence having incurred liability for eviction was being pursued by the landlord in appeal. The question whether the tenant's defence against eviction was liable to be

struck out or not, was an issue open before the appellate Court and was being clearly pressed by the landlord for decision. The tenant, in order to escape the rigour of his defence against eviction being struck out and to avail the benefit of relief against eviction under sub-section (6), or, to be more accurate, to see such relief as was allowed to him by the trial Court being upheld by the appellate Court, shall have to satisfy the appellate Court also of his compliance with sub-section (4) up to the date of judgment by the appellate Court. The tenant was, therefore, continuing to deposit the rent during the pendency of the appeal. There was no occasion for the landlord to hold the tenant a defaulter for the period 5.11.1983 to 28.7.1984 and file a second suit for eviction in view of the tenant continuing to deposit the rent in the appeal preferred by the landlord against the decree in the first suit. The tenant was not required to pay the same rent twice over personally to the landlord or to tender the same in one of the modes prescribed by Section 19-A. The question of payment, remittance or deposit of rent by tenant in one of the modes provided by Section 19-A could have arisen if there was no suit or appeal pending before the landlord and the tenant and therein the tenant was not required to deposit, or could not have made deposit of, rent in Court. The tenant, in the case before us, was not in default for the period 5.11.1983 to 28.7.1984 and no cause of action arose to the landlord for filing the second suit for eviction. The suit was entirely misconceived. The First Appellate Court deciding appeal in the second suit was, therefore, right in reversing the decree of the trial Court and directing the second suit

> to be dismissed. The High Court has clearly erred in law in upholding availability of ground under Section 13(1)(a) of the Act to the landlord in the second suit.
>
> (9) Before parting, we would like to sound a note of caution. During the course of hearing a decision by Rajasthan High Court in Kamruddin v. Wahid Ali (1987 (1) RLR 290) was brought to our notice wherein the view taken by the High Court is that compliance with Section 13 of the Act need not be made during the pendency of appeal. We have taken a view to the contrary. To obviate the unforeseen difficulty which the tenants are likely to face in those matters which may be pending in appeal we would like to clarify that before striking out the defence under sub-section (5) or denying the benefit of relief against eviction under sub-section (6), for failure to comply with sub-section (4), of Section 13 of the Act during the pendency of appeal, the appellate Court shall afford the tenant a reasonable opportunity for compliance on this decision coming to or being brought to its notice. However, this judgment shall not be a ground for re-opening any matter which stands already concluded."

From the perusal of the above quoted part of the judgment of Hon'ble the Supreme Court it is clear that the obligation of the tenant to continuously pay the rent as per Section 13(4) of the Act is not dispensed with even if the landlord fails to apply to the court for striking out defence of the tenant under Sub-section (5) of Section 13 of the Act, because even after striking out defence, if it was to be, Sub-section (5) requires that the court shall proceed with the hearing of the suit. Naturally the findings of the court would depend upon the

material and evidence before it. Sub-section (6) gives the protection against a decree for eviction on the ground of default only if the tenant makes a deposit or payment as required under sub-section (4). Therefore, even if his defence is not struck out under sub-section (5), his duty to continuously pay the rent and show it to the satisfaction of the court that he has done so is independent of any application of the landlord for striking out the defence under sub-section (5). This proposition of law is further supported by the judgment of Hon'ble the Supreme Court in the case of **J.L. Varandani V. Ashalata Mukherjee** [(1990)4 SCC 40], wherein the Hon'ble Supreme Court held while dealing with a case arising under West Bengal Premises Tenancy Act, 1956 that ***"the mere fact that the court had not passed an order striking of the defence*** is contemplated under section 17 (3) because of the tenant's failure to deposit within the time specified in the order passed under section 17(2) and 17(2-A) does not necessarily lead to a presumption that the time was extended. On the other hand, section 17 (2-B) which is a mandatory provision lays down that no application for extension of time for the deposit or payment of any amount under clause (a) of sub-section (2-A) shall be entertained unless it is made before the expiry of the time specified in sub-section (1). Therefore, in the absence of such application it cannot be contended that the court is deemed to have condoned the delay. ..... ***"Since such a deposit is the condition precedent for seeking relief under section 17 (4) the appellant who has not fulfilled the same cannot claim the said relief."***

7. Section 13(4) of the Act has been held to be mandatory by the Hon'ble Supreme Court in case of

Nasiruddin and others v. Sita Ram Agarwal (AIR 2003 SC 1543) wherein the Hon'ble Supreme Court reversing the judgment of Rajasthan High Court reported in 1997 (1) RLR 686 held that the word `Shall' used in section 13(4) of the Act makes it mandatory provision and it is true that the Rajasthan Act does not expressly exclude the application of the Limitation Act, but section 5 in its terms is not applicable to wherever there is a default in depositing the rent by the tenant. Sub-section (4) of Section 13 itself provides for limitation of a specific period within which the deposit has to be made, which cannot be exceeding three months as extended by the court. Secondly, the deposit by the tenant within 15 days is not an application within the meaning of section 5 of Limitation Act, 1963. Since the deposit does not require any application, therefore, the provisions of section 5 can not be extended where the default takes place in complying with an order under sub-section (4) of the Act.

8. Learned counsel for the respondent-tenant Mr. R.K. Mathur has relied upon the decisions of this Court in case of **B.B. Bhalla Vs. Rameshwar Kishore Badhwar** [2001 (2) WLC (Raj.) 490]; **Phool Chand & Anr. Vs. Dr. Gulab Chand** [1993 (3) WLC (Raj.) 189]; and **Radha Kishan Vs. Lrs. Of Gulshan Behari** [2001 (5) WLC (Raj.) 375] and submitted that the burden of proof lies on the plaintiff-landlord to prove the default on the part of tenant and negative burden cannot be cast upon the landlord to prove that he was not defaulter and even if the defence is struck out U/s.13(5) of the Act, the plaintiff is not absolved from proving the default. There is no dispute on the legal principle that the initial burden of proof lies upon the landlord to show that there was default in payment of rent on the part of tenant, however, such burden of proof shifts once the landlord alleges and

prima facie shows that there was default in payment of rent. In the present case, not only the landlord has raised the issue of default and shown it before the trial court that there was default in payment of rent but had also filed cross objections on the issue of default before the first Appellate Court. This issue was also raised on behalf of landlord while arguing the present second appeal and learned counsel for the landlord Mr. Mandhana also shown in the court a list of various payments of rent made by the tenant and pointed out that there was no regular payments and defaults had occurred in payment of rent in accordance with Section 13(3) read with Section 13(4) of the Act. However, this was objected to by the learned counsel for the tenant Mr. Mathur. Therefore, in view of the law laid down by Hon'ble Supreme Court as aforesaid, the burden of proof in the present case shifted on the tenant once the initial burden of showing the default in payment of rent was discharged by the landlord. Such burden of proof shifted on the tenant has not been discharged by the tenant in the present case, therefore, the aforesaid cases cited by Mr. Mathur are of no help to the tenant in the present case.

9. Mr. Mathur also relied upon the judgments of this Court in case of **Kewal Vs. Sesmal** [1981 RLW 77] and full Bench decision of this Court in case of **Raghunath Singh Vs. (Minor) Vikram Sharma & Ors.** [1996 (1) WLC (Raj.) 398] in support of the contention that the payment of rent month by month as envisaged U/s.13(4) of the Act did not apply during the pendency of the appeal once the trial court had held that the tenant was not in default. With great respects, these judgments are of no avail and should be deemed to have been impliedly over-ruled in view of the Apex Court decision in case of Shiv Dutt Jadiya's case (supra) in which it has been clearly laid

down that the requirement to pay the rent regularly continues even during the pendency in the first Appellate Court as well as this Court in second appeal.

10. Thus, it is clear that notwithstanding the failure on the part of landlord to apply to court for striking out the defence of tenant, the tenant is not absolved either from its obligation to regularly deposit and pay the rent under sub-section (4) but also to establish before the court that he has done so, if he intends to take advantage of no decree of eviction on the ground of first default under section 13(6) of the Act. The proviso to sub-section (6) denies the benefit of no decree for eviction on the ground of default if such default is committed for the second time. In the present case, the tenant does not appear to have brought anything before the courts below nor even before this Court that he has regularly and punctually paid the rent in accordance with sub-section (4) of Section 13 of the Act, he has chosen to merely harp upon the findings of the two courts below that there was no default on the part of the tenant which findings do not appear to be based on any material on record. Despite the contention of the learned counsel for landlord raised in this Court also that the tenant has defaulted in payment of rent as agreed and as determined by the court on 13.9.1976, learned counsel for tenant instead of taking this opportunity to place on the record of this Court the evidence showing upto date and regular payment of rent by the tenant, chose to object to even raising of this contention by the learned counsel of the landlord. This with respects, cannot be said to be enough and justified and therefore, the findings of the two courts below which are laconic and not based on material before it that there was no default on the part of the tenant cannot be sustained, more so, as the said findings have been given on the basis of landlord not filing

application for striking out the defence of tenant rather than based on any proof of such regular payment/deposit of rent by the tenant. In the absence of tenant having shown in any manner before the two courts below and even before this court that he has regularly and punctually complied with the mandatory provisions of section 13(4) of the Act and made deposit of the rent in accordance with Section 13 (4) of the Act, the decree of eviction on the ground of even default deserves to be given in favour of the landlord. The tenant cannot be allowed to take advantage of the inaction on the part of landlord of not filing any application for striking out the defence of the defendant which so happened in the present case and it would be putting premium on default of tenant by allowing him to take advantage of his own default. The said issue No. 4 is, therefore, accordingly decided in favour of the appellant-landlord and against the tenant.

Issue of Partial Eviction

11. Regarding partial eviction of the suit premises, while the learned counsel for the landlord submitted that the tenant has since been allotted a plot by UIT in an iron and steel Mandi developed by the State Government and he has already started business there and on the other hand continuing the said business in the suit premises which is the central market place is neither proper nor justified on the contrary the landlord having several agency business of cattle feed, cement etc. is made to suffer and carry on his agency business in a small 'Kotri', a section of place underneath the stair case which is hardly 5'x4”and whereas the landlord requires at least 750 sq. feet of area for carrying out his these agency business and even the 'Jota' shop in question having area of about 400 sq. feet will not fully meet the landlord's requirement and the landlord cannot

be compelled to take on rent other business premises at other places to carry on his business and, therefore, instead of partial eviction complete eviction of shop in question should be decreed in favour of the landlord. On the other hand, learned counsel for the tenant, Mr. Mathur argues that the partial eviction of the suit premises in question would meet the ends of justice and the same is in accordance with Sec.14(2) of the Act and the landlord has already set up an office or a departmental store in the same building in other shop and, therefore, he can conveniently run his agency business from such other premises. He relies upon the following judgments in support of his submissions:-

(i) Bharatpur Whole Sale Sahkari Upbhokta Bhandar Ltd.Vs. Shri Sohal Lal [(1997) 3 WLC 128]

(ii) Jivram Ranchhoddas Thakkar & Anr. Vs. Tulshiram Ratanchand Mantri & Ors. [AIR 1977 SC 1357]

(iii) Rahman Jeo Wangnoo Vs. Ram Chand & Ors.[AIR 1978 SC 413]

(iv) Satwant Kaur Vs. Dhund Singh
[AIR 1983 SC 623]

(v) L.Rs. Of Ibrahim & Ors. Vs. L.Rs. Of Fakruddin & Ors.
[RLW 1997 (2) Raj. 768]

(vi) Radha Kishan Vs. Naraindas
[1983 (2) RCJ 472]

(vii)Nasirul Haque Vs. Jitendra Nath
[AIR 1984 SC 1799]

12. These case law also cited by the learned counsel for the tenant with respects, are of no avail to the tenant. In Bharatpur Wholesale Sahkari Upbhokta Bhandar Ltd.' case, this Court held that plea of partial eviction can

be taken even in second appeal. This is not the situation here. In Jivram Ranchhorddas Thakkar's case, the Hon'ble Supreme Court in the fact and circumstances taking a humanistic approach adopted a course of 'live and let live' under Article 136 and directed the tenant in the interest of justice to surrender half of the portion after getting it partitioned into equal halves. This case is also of no avail to the tenant in the present case. In Lrs. of Ibrahim's case, this Court held that it is mandatory before passing a decree of eviction to consider the possibility of partial eviction. Such is not the case here, therefore, this judgment is also of no help to the learned counsel for the tenant. In Satwant Kaur's case, the Hon'ble Supreme Court upheld the decree passed by the High Court and partial eviction considering the nature of landlord's business and the necessity of godown for tenant's business decreeing partial eviction only from back side of shop and held that such decree would not create difficulties to landlord in starting his business. The said case having turned on its facts is distinguishable from the facts of present case. Thus, the case law cited above are of no avail to the learned counsel for the tenant, therefore, the issue of partial eviction has to be further considered in the light of the facts obtaining in the present case.

13. The contention of Mr. Mathur about departmental store is countered by Mr. Mandhana, learned counsel for landlord that the said departmental store belongs to his son and the landlord is neither doing nor he can carry out his agency business from the same premises in which such departmental store exists and he also submitted that in fact the tenant where he resides in the property which belonged to his mother and after death of his mother has devolved upon him and in that very building he has two

shops where he can conveniently shift his business which is being carried out in present suit premises and, therefore, there is no justification whatsoever for maintaining the partial eviction as directed by the courts below and since the premises in question are required for bona fide personal necessity of the landlord, decree of complete eviction deserves to be granted in favour of the landlord.

14. Having heard the learned counsel and upon perusal of the statements of parties also before the trial court, this Court is of the view that greater hardship would be caused to the landlord if the partial eviction decreed by the courts below is maintained in view of undisputed position that the tenant has already been allotted a plot by UIT for carrying on his iron and steel business and also in view of the fact that an alternate accommodation is available to the tenant compared with the personal bona fide necessity of the landlord requiring the 'Jota' shop in question for carrying out his agency business, this Court is of the view that on the ground of comparative hardship, the landlord would be put to a greater hardship if the partial eviction ordered by the courts below is maintained. The second part of Section 14 (2) of the Act envisages a situation of no hardship by making an order of partial eviction but here is a case where a greater hardship is likely to be caused to the landlord by maintaining the decree of partial eviction.

15. Therefore, in the facts and circumstances of the case this Court is of the opinion that a decree of complete eviction deserves to be given in favour of the landlord.

16. Consequently, the landlord's appeal S.A.No.61/1993

is allowed and the tenant's appeal S.A.No.263/1993 is dismissed and the tenant is granted three months time to hand over the vacant and peaceful possession of the suit premises i.e. 'Jota' shop in question to the landlord. No order as to costs.

(Dr. VINEET KOTHARI), J.

VS/